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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|--------------------------|------------------|
| 09/747,775 | 12/22/2000 | Weijun Li | 031994-170 | 4406 |
| 7590 | 03/04/2004 | | EXAMINER | |
| ANTHONY T. CASCIO, ESQ., BURNS, DOANE, SWECKER & MATHIS, L.L.P. P.O. Box 1404 Alexandria, VA 22313-1404 | | | GRAVINI, STEPHEN MICHAEL | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 3622 | |

DATE MAILED: 03/04/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

| Office Action Summary | Application No. | Applicant(s) |
|------------------------------|-------------------|--------------|
| | 09/747,775 | LI, WEIJUN |
| | Examiner | Art Unit |
| | Stephen M Gravini | 3622 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 18 August 2002.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-29 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-29 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
5) Notice of Informal Patent Application (PTO-152)
6) Other: _____

DETAILED ACTION

Requirements for Information

37 CFR 1.105 states: (a) (1)In the course of examining or treating a matter in a pending or abandoned application filed under 35 U.S.C. 111 or 371 (including a reissue application), in a patent, or in a reexamination proceeding, the examiner or other Office employee may require the submission, from individuals identified under § 1.56(c), or any assignee, of such information as may be reasonably necessary to properly examine or treat the matter, for example:

- (i) Commercial databases : The existence of any particularly relevant commercial database known to any of the inventors that could be searched for a particular aspect of the invention.
- (ii) Search : Whether a search of the prior art was made, and if so, what was searched.
- (iii) Related information : A copy of any non-patent literature, published application, or patent (U.S. or foreign), by any of the inventors, that relates to the claimed invention.
- (iv) Information used to draft application : A copy of any non-patent literature, published application, or patent (U.S. or foreign) that was used to draft the application.

(v) Information used in invention process : A copy of any non-patent literature, published application, or patent (U.S. or foreign) that was used in the invention process, such as by designing around or providing a solution to accomplish an invention result.

(vi) Improvements : Where the claimed invention is an improvement, identification of what is being improved.

(vii) In Use : Identification of any use of the claimed invention known to any of the inventors at the time the application was filed notwithstanding the date of the use.

(2) Where an assignee has asserted its right to prosecute pursuant to § 3.71(a) of this chapter, matters such as paragraphs (a)(1)(I), (iii), and (vii) of this section may also be applied to such assignee.

(3) Any reply that states that the information required to be submitted is unknown and/or is not readily available to the party or parties from which it was requested will be accepted as a complete reply.

(b) The requirement for information of paragraph (a)(1) of this section may be included in an Office action, or sent separately.

(c) A reply, or a failure to reply, to a requirement for information under this section will be governed by §§ 1.135 and 1.136.

The Office is requiring submission of information reasonably necessary to properly examine and treat the claimed subject matter under Rule 105. Of particular interest is information used in drafting the present operation including information related to the field of endeavor or business practices used by applicants' professional business ventures, to show the information used in the invention process, and identification of any use of the claimed invention known to the inventor at the time the application was filed notwithstanding the date of the use. Since the application is filed as a small entity status, along with the fact that the assignee has other pending applications and/or patented inventions closely related to the claimed invention along with the fact that no information disclosure statement has been filed, it appears that it would be appropriate to require the applicants to provide information necessary to ensure a quality examination may be performed by the Office.

Specification

The incorporation of essential material in the specification by reference to a patent, patent application, or to a publication is improper. Applicant is required to amend the disclosure to include the material incorporated by reference. The amendment must be accompanied by an affidavit or declaration executed by the applicant, or a practitioner representing the applicant, stating that the amendatory material consists of the same material incorporated by reference in the referencing application. See *In re Hawkins*, 486 F.2d 569, 179 USPQ 157 (CCPA 1973); *In re Hawkins*, 486 F.2d 579, 179 USPQ 163 (CCPA 1973); and *In re Hawkins*, 486 F.2d

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577, 179 USPQ 167 (CCPA 1973). Specifically applicant's specification incorporates U.S. applications 09/053,949 and 09/675,566 by reference but does not include copies of those references with the present application. Also the second application, 09/675,566, appears to be unrelated to the present application, since the inventors, assignee, and claimed subject matter are not pertinent to applicant's invention under examination.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

As an initial matter, the United States Constitution under Art. I, §8, cl. 8 gave Congress the power to "[p]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". In carrying out this power, Congress authorized under 35 U.S.C. §101 a grant of a patent to "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof." Therefore, a fundamental premise is that a patent is a statutorily created vehicle for Congress to confer an exclusive right to the inventors for "inventions" that promote the progress of "science and the useful arts". The phrase "technological arts" has been created and used by the courts to offer another view of the term "useful arts".

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See *In re Musgrave*, 167 USPQ (BNA) 280 (CCPA 1970). Hence, the first test of whether an invention is eligible for a patent is to determine if the invention is within the "technological arts".

Further, despite the express language of §101, several judicially created exceptions have been established to exclude certain subject matter as being patentable subject matter covered by §101. These exceptions include "laws of nature", "natural phenomena", and "abstract ideas". See *Diamond v. Diehr*, 450, U.S. 175, 185, 209 USPQ (BNA) 1, 7 (1981). However, courts have found that even if an invention incorporates abstract ideas, such as mathematical algorithms, the invention may nevertheless be statutory subject matter if the invention as a whole produces a "useful, concrete, and tangible result." See *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* 149 F.3d 1368, 1973, 47 USPQ2d (BNA) 1596 (Fed. Cir. 1998). Together, the "technological arts" and "useful, concrete, and tangible result" judicial review standard, result in a comprehensive examination standard wherein the "technological arts" is one element and the "useful, concrete, and tangible result" is another complementary element.

This comprehensive examination standard was evident when the Court of Customs and Patent Appeals (CCPA) decided an appeal from the Board of Patent Appeals and Interferences (BPAI). See *In re Toma*, 197 USPQ (BNA) 852 (CCPA 1978). In *Toma*, the court held that the recited mathematical algorithm did not render the claim as a whole non-statutory using the Freeman-Walter-Abele test as applied to *Gottschalk v. Benson*, 409 U.S. 63, 175 USPQ (BNA) 673 (1972). Additionally, the

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court decided separately on the issue of the "technological arts". The court developed a "technological arts" analysis:

The "technological" or "useful" arts inquiry must focus on whether the claimed subject matter...is statutory, not on whether the product of the claimed subject matter...is statutory, not on whether the prior art which the claimed subject matter purports to replace...is statutory, and not on whether the claimed subject matter is presently perceived to be an improvement over the prior art, e.g., whether it "enhances" the operation of a machine. *In re Toma* at 857.

In *Toma*, the claimed invention was a computer program for translating a source human language (e.g., Russian) into a target human language (e.g., English). The court found that the claimed computer implemented process was within the "technological art" because the claimed invention was an operation being performed by a computer within a computer.

The decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* never addressed this prong of the test. In *State Street Bank & Trust Co.*, the court found that the "mathematical exception" using the Freeman-Walter-Abele test has little, if any, application to determining the presence of statutory subject matter but rather, statutory subject matter should be based on whether the operation produces a "useful, concrete and tangible result". See *State Street Bank & Trust Co.* at 1374. Furthermore, the court found that there was no "business method exception" since the court decisions that purported to create such exceptions were based on novelty or lack of enablement issues and not on statutory grounds. Therefore, the court held that "[w]hether the patent's claims are too broad to be patentable is not to be judged under §101, but rather under §§102, 103 and 112." See *State Street Bank & Trust Co.* at 1377. Both of these

analysis goes towards whether the claimed invention is non-statutory because of the presence of an abstract idea. Indeed, *State Street* abolished the Freeman-Walter-Abele test used in *Toma*. However, *State Street* never addressed the second part of the analysis, i.e., the "technological arts" test established in *Toma* because the invention in *State Street* (i.e., a computerized system for determining the year-end income, expense, and capital gain or loss for the portfolio) was already determined to be within the technological arts under the *Toma* test. The Board of Patent Appeals and Interferences (BPAI) have recently acknowledged this dichotomy in affirming a §101 rejection finding the claimed invention to be non-statutory. See *Ex parte Bowman*, 61 USPQ2d (BNA) 1669 (BPAI 2001).

Claims 1-15 are rejected under 35 U.S.C. 101 because the independently claimed invention does not recite a useful, concrete, and tangible result under *In re Alappat*, 31 USPQ2d 1545 (Fed. Cir. 1994) and *State Street Bank & Trust Co. v. Signature Financial Group Inc.*, 47 USPQ2d 1596 (Fed Cir. 1998) such that the claimed invention is within the technological arts under *In re Waldbaum* 173 USPQ 430 (CCPA 1972) wherein the phrase "technological arts" is synonymous with "useful arts" as it appears in Article I, Section 8 of the United States Constitution. In this claim, it is considered that a concrete and tangible result is not recited. Specifically, the recitation of providing content adapted to a program, determining a user right, and invoking an attachment is considered not to produce a concrete result because a result cannot be assured or is not reproducible. The providing content adapted to a program, determining a user right, and invoking an attachment recitations are considered an abstract concept that is non-enabling because those steps are merely intended uses

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that are considered not to fall within technological arts. Furthermore, under *In re Wamerdam*, 33 F.3d 1354; 31 USPQ2d 1754 (Fed. Cir. 1994), the providing content adapted to a program, determining a user right, and invoking an attachment recitations are considered intangible because those steps are simply an abstract construct, such as a disembodied data structure and a method of making it, wherein those recitations involve more than a manipulation of an abstract idea and therefore is non-statutory under 35 USC 101. Because the independently claimed invention does not recite a useful, concrete, and tangible result, such that it is considered not within technological arts so that it uses technology in a non-trivial matter. Finally under *Ex parte Bowman*, 61 USPQ2d 1665 (Bd. Pat. App. & Inter. 2001) (unpublished but cited for analysis rather than precedent), in which an invention disclosed and claimed directed to a human merely making mental computations and manually plotting results on a paper chart is nothing more than an abstract idea which is not tied to any technological art and is not a useful art as contemplated by the United States Constitution. In this independently claimed invention, the steps of providing content adapted to a program, determining a user right, and invoking an attachment are considered nothing more than an abstract idea since it is not tied to any technological art. However in order to consider those claims in light of the prior art, examiner will assume that those claims recite statutorily permitted subject matter.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-15 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Johnson (US 6,052,670).

Claims 16-29 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Herz et al. (US 5,754,939).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over examiner's personal experience with advertising enabling electronic content as provided by cable television subscription and viewership. The claimed electronic content including advertisements, executable program, executable module, server, web browser program, computer network, and streaming socket connection are considered automated features of an old and well known manual operation, which will also be discussed infra. The claimed invention under examiner experience is based on the broadest reading of the claims under the *Graham* decision. Since at least 1990,

examiner has experienced cable television subscription and viewership, which has performed the claimed method comprising:

providing content to a program adapted to read said content, said content having associated therewith a user right or controlling the execution environment of an executable program with control instructions such that a call is made by said executable program to file access functions to obtain said content is first directed to said control instructions;

determining said user right in said content by control instructions or not; and invoking an instruction attached to said program to obtain at least one advertisement in the event said user right is indicative of a restricted right with an option of control instructions by making a call by said control instructions, obtaining content from said instructions, and transmitting said content to said program through said control instructions are part of examiner's personal experience. Examiner's personal experience also includes the claimed user advertisement at occasional timed presentations or periodic intervals, video or audio user interface, sequence advertisements, encrypting/decrypting, and media player or shared library. As a premise, the independently claimed user right or restricted right is considered a right associated with a cable television subscription (i.e. if an examiner-type consumer subscribes to receive local cable television broadcasts, that subscription includes a user right or restricted right not available to non-subscribers). The claimed executable module or executable instructions are considered merely instructions included in cable television subscriptions and viewership (i.e. merely subscribing to a cable television

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broadcast necessarily includes a right to view user or restricted content including advertisements). The claimed feature of providing content to a program adapted to read said content, said content having associated therewith a user right or controlling the execution environment of an executable program with control instructions such that a call is made by said executable program to file access functions to obtain said content is first directed to said control instructions is considered functionally equivalent to examiner subscribing to cable television programming or broadcasting such that a desired level of viewing sports on ESPN, viewing governmental affairs on C-SPAN, and viewing news on CNN grants an examiner-type consumer a user or restricted right to call those respective broadcast channels based on that right. The claimed step of determining said user right in said content by control instructions or not is considered functionally equivalent the signal sent through a cable provided to the examiner-type customer television set or signal encryption descrambler set top box consistent with the cable subscription by the examiner-type consumer. The claimed step of invoking an instruction attached to said program to obtain at least one advertisement in the event said user right is indicative of a restricted right with an option of control instructions by making a call by said control instructions, obtaining content from said instructions, and transmitting said content to said program through said control instructions is considered equivalent to advertisements associated with the cable television programming assigned to examiner-type consumer subscription. The claimed user advertisement at occasional timed presentations or periodic intervals, video or audio user interface, sequence advertisements, encrypting/decrypting, and media player or shared library are

considered part of cable television subscription and viewership included in examiner's experience. The claimed invention contains automated features, such as electronic content including advertisements, executable program, executable module, server, web browser program, computer network, and streaming socket connection which are obvious automated variations to the examiner's experience such that the examiner will use Official notice to obviate that claimed subject matter. The electronic content including advertisements, executable program, executable module, server, web browser program, computer network, and streaming socket connection, as claimed, are interpreted to encompass automated electronic communications associated with electronic mail, Internet, and/or computer to server communications that have been performed by cable television industry using manual or semi-automated means incorporating manual means of the presently claimed automated invention. The claimed invention, recited by the applicant, is considered to have been provided to examiner by personal experience long before the filing of applicant's invention. Those terms are merely modern terms for the method used to carry out the functionality of the claimed invention. More specifically the claimed electronic content including advertisements, executable program, executable module, server, web browser program, computer network, and streaming socket connection are considered modern day terms in describing cable line or radio communications used over cable television networks in broadcasting with respect to advertising. Examiner notes that it is old and well known to those skilled in the art of the claimed method, that it would have been obvious to claim the invention as recited by the applicants, in order to overcome the explicit teachings of

examiner's personal experience discussed supra. It would have been obvious to one skilled in the art to provide the automated claimed method since those features, particularly electronic content including advertisements, executable program, executable module, server, web browser program, computer network, and streaming socket connection are merely automated features of a concept that is old and well known. Please see *In re Venner*, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958) in which the court held that broadly providing an automatic or mechanical means to replace a manual activity which accomplished the same result is not sufficient to distinguish over the prior art. The motivation to combine applicants' claimed invention with the services offered by employing the services of a cable television subscription under examiner experience is to allow greater consumer targeting capabilities through electronic mediums, while transferring information, which clearly shows the obviousness of the claimed invention. One would also be motivated to combine the teachings of examiner's experience with current computer and network innovations available such that much of cable television objectives can be carried out in a more efficient manner through computer technology than manually inserting user right advertisements. One would be further motivated to combine the claimed automated features claimed with the user right advertising to more precisely control advertising revenue in a broadcast environment.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent

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and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-29 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-14 of U.S. Patent No. 6,285,985 or as being unpatentable over claims 1-17 of U.S. Patent No. 6,334,213. Although the conflicting claims are not identical, they are not patentably distinct from each other because the present application and either of the commonly assigned patented inventions involve applicant's inventive concept of user right advertising discussed above in the obviousness rejection and recited in the patented claims.

Claims 1-29 provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending Application No. 09/675,568. Although the conflicting claims are not identical, they are not patentably distinct from each other because the present application and the commonly assigned co-pending application involve applicant's inventive concept of user right advertising discussed above in the obviousness rejection and recited in the co-pending claims.

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This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Beach et al. (WO 97/30409) represents the most relevant foreign patent with respect to applicant's claimed invention while reference U, cited in this action represents the most relevant non-patent literature reference with respect to applicant's claimed invention.

Any inquiry concerning this communication or earlier communication from the examiner should be directed to Steve Gravini whose voice telephone number is (703) 308-7570 and electronic transmission / e-mail address is "steve.gravini@uspto.gov". Examiner can normally be contacted Monday through Friday from 6:00 a.m. to 3:30 p.m. **If applicants choose to send information by e-mail, please be aware that confidentiality of the electronically transmitted message cannot be assured.** Please see MPEP 502.02. Information may be sent to the Office by facsimile transmission. The facsimile transmission telephone numbers for TC-3600 are:

| | |
|--------------------|----------------|
| After-final | (703) 872-9327 |
| Official | (703) 872-9306 |
| Non-Official/Draft | (703) 872-9325 |


STEPHEN GRAVINI
PRIMARY EXAMINER

smg
February 27, 2004